No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *ET AL*, *Petitioners*,

v.

JOHN HELLERSTEDT, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, U.S. Justice Foundation, Institute on the Constitution, and Southwest Prophecy Ministries in Support of Respondents

MICHAEL CONNELLY
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

J. MARK BREWER
BREWER & PRITCHARD, P.C.
Three Riverway, 18th Floor
Houston, TX 77056
(713) 209-2950

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

Attorneys for Amici Curiae
**Counsel of Record*

February 3, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT

I. THE RIGHT OF PRIVACY, AS DEFINED BY THIS COURT, MUST BE EXERCISED TOGETHER BY A PREGNANT WOMAN AND A STATE-LICENSED MEDICAL PRACTITIONER, IN A STATE-APPROVED FACILITY 4

A. The Roe v. Wade Right of Privacy Is Not Exercised by the Pregnant Woman Alone 5

B. The Admitting Privileges Requirement Is Subsumed in the Pregnant Woman's Privacy Right and, Therefore, Does Not Unconstitutionally Burden that Right 9

C. The Ambulatory Surgical Center Requirement Is Subsumed in the Pregnant Woman's Privacy Right and, therefore, Does Not Unconstitutionally Burden that Right 11

II. ROE V. WADE REPRESENTED A RADICAL BREAK WITH AMERICA'S CONSTITUTIONAL TRADITION 14

A. Texas Ably Defends the Texas Statutes Based on this Court's Abortion Jurisprudence 14

B. The Texas Statutes Were a Response to the Murders Perpetrated by Abortionist Dr. Kermit Gosnell 14

C. This Court's Abortion Jurisprudence Is Predicated on a Rejection of the Foundations of Our Republic 16

D. When Life Begins Is a Quintessential Religious Issue 21

CONCLUSION 24

TABLE OF AUTHORITIES

	Page
HOLY BIBLE	
Genesis 1:27	19, 22
Exodus 20:13, 21:22-23	22
Deuteronomy 27:25	22
Deuteronomy 30:19	22
Job 10:8-12, 12:10, 31:15	22
Psalm 22:10, 127:3-5, 139:13-16	22
Isaiah 49:15	22
Jeremiah 1:5, 7:6, 20:17	22
Ezekiel 16:20-21	22
Amos 1:13	22
Matthew 2:13-23, 19:14	22
Galatians 1:15	22
U.S. CONSTITUTION	
Preamble	23
Article V	3, 17
Fourteenth Amendment.	19
CASES	
Connecticut v. Menillo, 423 U.S. 9 (1975)	9, 11, 12
Mazurek v. Armstrong, 520 U.S. 968 (1997)	9, *passim*
Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856)	19
Planned Parenthood v. Casey, 505 U.S. 833 (1992)	1, *passim*
Roe v. Wade, 410 U.S. 113 (1973)	1, *passim*
Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)	13

MISCELLANEOUS

R. Alcorn, "Scientists Attest to Life Beginning at Conception" 22

G. Carey & J. McClellan, The Federalist (Kendall-Hunt:1990) 23

T. Cooley, Treatise on the Constitutional Limitations (Little Brown: 1883) 16

W. Durant, Story of Civilization III: Caesar and Christ (Simon & Schuster: 1944) 20, 21

M.S. Evans, The Theme is Freedom (Regnery: 1994) 20

R. Goldman, "Kermit Gosnell Avoids Death Row, Agrees to Life in Prison," ABC News (May 14, 2013) 16

E.D. Hirsch, Validity in Interpretation (Yale: 1967) 17

Hollingsworth v. Perry, 579 U.S. ___, 133 S.Ct. 2652 (2013), Oral Argument (Mar. 26, 2013) 18

J. McCarthy, "Confidence in U.S. Branches of Government Remains Low," Gallup.com (June 15, 2015) 17

P Miller, The Legal Mind in America, 178 (Cornell: 1962) 19, 20

W. H. Rehnquist, "The Notion of a Living Constitution," 29 HARV. J. OF LAW & PUB. POLICY 401 (Spring 2006) 18

Report of the Grand Jury, In Re County Investigating Grand Jury XXIII, No. 0009901-2008 (1st Judicial Dist. of Pa.; Jan. 14, 2011) 15

A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (West: 2012) 18

INTEREST OF THE *AMICI CURIAE*[1]

Conservative Legal Defense and Education Fund and U.S. Justice Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Institute on the Constitution is an educational organization. Southwest Prophecy Ministries is a religious and educational organization.

These legal, policy, and religious organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

SUMMARY OF ARGUMENT

As initially defined by this Court, the privacy right created in Roe v. Wade was never absolute. As affirmed by the plurality opinion in Planned Parenthood v. Casey, rather, it may only be exercised by a pregnant woman in consultation with a physician licensed by a State, and in a facility approved by a State. Designed to protect the health of a pregnant woman, the new Texas requirements that she be attended by a physician with local hospital privileges

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

in a facility that meets the standards of ambulatory surgical centers fit well within the constitutional parameters of this Court's privacy right precedents.

Both the Petitioners and the United States as *amicus curiae* would have this Court ignore the limited nature of the privacy right, requiring Texas to affirmatively demonstrate to a court that the State's health concerns are strong enough to override any hindrance standing in the way of a pregnant woman's access to an abortion. That is not the rule of this Court's precedents which establish that the State enjoys a "broad latitude" to establish and enforce its protective health policies, so long as they rest upon a "rational basis," as is the case here.

For these reasons, the challenge to the Texas laws should be resolved on the basis advanced by the State of Texas — that they do not impose an "undue burden" on a woman's access to abortion under Planned Parenthood v. Casey. If, however, this Court determines that the Texas laws do not pass that test, instead of striking down these statutes, this Court should consider whether Casey, decided in the aftermath of Roe v. Wade, is still good law. These *amici* urge that such a decision could come only after ordering supplemental briefing on that Constitutional issue.

This Court should not simply assume that Roe and its progeny are good law, as they can best be understood to be aberrational cases, reached in error by this Court.

Thomas Cooley observed, "The meaning of the constitution is fixed when it is adopted." It is not subject to revision except by the constitutionally-prescribed process set out in Article V On the other hand, Roe is based on an entirely different premise — that the constitution is an evolving, living document, under the authority of the Court. In Roe, the Court employed the atextual notion of "privacy" and the judicially invented doctrine of substantive due process. Employment of these judicial self-empowerment doctrines allowed the Court to disregard any search for the objective meaning of the text, and gave juridical cover to a lawless act by which a majority of the lawyers sitting as justices at that time elevated their subjective personal values and political views over the "fixed" meaning of the constitutional text.

In describing the source of American jurisprudence, Justice Joseph Story lectured Harvard Law students of his era "that Christianity is part of the Common Law.... There never has been a period in which the Common Law did not recognize Christianity as lying at its foundations." Justice Blackmun began his analysis of the issue of when life begins not by reference to Christianity or God or the Holy Bible, but rather by exploring Greek and Roman practices, finding that these early pagan societies embraced abortion. Justice Blackmun failed utterly to give any consideration whatsoever to Biblically revealed truth. Yet the Declaration of Independence, the nation's charter, recognized that our rights are God-given, not judicially invented out of whole cloth, as was the case in Roe v. Wade.

ARGUMENT

I. THE RIGHT OF PRIVACY, AS DEFINED BY THIS COURT, MUST BE EXERCISED TOGETHER BY A PREGNANT WOMAN AND A STATE-LICENSED MEDICAL PRACTITIONER, IN A STATE-APPROVED FACILITY.

In their opening brief, Petitioners assert that "*Casey* reaffirmed 'the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.'" *See* Brief for Petitioners ("Pet. Br.") at 2. According to Petitioners, "[t]his protected liberty ... guarantees every woman the **ability** to make personal decisions about family and childbearing...." *Id.* (emphasis added). Indeed, Petitioners claim that the Casey plurality's "undue burden" test "gives real substance to 'the urgent claims of the woman to retain the **ultimate** control over her destiny and her body'... while permitting laws that are designed to inform **her** decision." *Id.* (emphasis added).

Omitted, however, in the Petitioners' summary of Casey, is the plurality's concession that "the Constitution gives the **States broad latitude** to decide that particular functions may be performed **only** by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 885 (1992) (emphasis added). In fact, that "broad latitude" — requiring a licensed professional to participate in the

abortion decision — is essential to the very definition of the right of privacy manufactured by this Court in Roe v. Wade, 410 U.S. 113 (1973).

A. The Roe v. Wade Right of Privacy Is Not Exercised by the Pregnant Woman Alone.

After a brief review of its precedents establishing what is said to be "a right of personal privacy," the Roe v. Wade Court concluded that "[t]his right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. But, the Court interjected, the woman's right is not "absolute": she is not "entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she **alone** chooses." *Id.* (emphasis added). To the contrary, the Roe v. Wade right contemplated that this would be a shared right, one that could not be exercised apart from the full participation of "her responsible physician." *Id.* Thus, the definition of the right itself was internally limited, not subject to the "woman's sole determination." *Id.*

Rather, like previously created privacy rights the Court specifically rejected the claim of an "**unlimited** right to do with one's body as one pleases." *Id.* at 154 (emphasis added). Further, like other previously created privacy rights:

> The pregnant woman cannot be isolated in her privacy.... The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education.... The

> woman's privacy is no longer **sole** and any right of privacy she possesses must be measured accordingly. [*Id.* at 159 (emphasis added).]

Having established that the woman's right was "not unqualified," the Roe v. Wade Court acknowledged that "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* Indeed, at the very point of decision whether to undergo an abortion procedure, the interests protecting the health of the pregnant woman are necessarily "dominant." For it is at that point that the Roe v. Wade Court acknowledged that the woman's health considerations go to the very heart of her right of privacy:

- "[s]pecific and direct harm medically diagnosable [is] involved";
- "[m]aternity, or additional offspring, may force upon the woman a distressful life and future";
- "[p]sychological harm may be imminent";
- "Mental and physical health may be taxed by child care";
- "There is also the distress ... associated with the unwanted child"; and
- "additional difficulties and continuing stigma of unwed motherhood may be involved." [*Id.* at 153.]

"[While] all [of] these ... factors," the Court concluded, were "detriments" imposed by state anti-abortion laws, under a woman's constitutional right of privacy, these same factors would be "consider[ed] in consultation"

between "the woman **and her responsible physician.**" *Id.* (emphasis added).

Moreover, the Roe v. Wade Court contemplated that the woman's privacy right only extended to **a** physician who was "licensed" by the State (*id.* at 163, 165):

> The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may **proscribe** any abortion by a person who is not a physician as so defined. [Roe at 165 (emphasis added).]

Additionally, it was the "attending physician" who determined whether the pregnant woman ultimately should submit her body to any particular abortion procedure: "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. In so ruling, the Roe v. Wade Court explained:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure **maximum safety** for the patient. This interest obviously extends at least to the **performing physician** and his staff, to the **facilities** involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. [*Id.* at 150 (emphasis added).]

Indeed, the Roe v. Wade Court observed:

> The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. [*Id.*]

Casey did not change this conditional definition of the woman's right of privacy. Rather, the Casey plurality, upon which the Petitioners rely, reaffirmed the "essential holding" of Roe v. Wade which gives way to "the principle that the State has legitimate interests **from the outset** of the pregnancy in protecting the health of the woman...." Casey at 846 (emphasis added). The Casey plurality repeated that "'*Roe* did **not** declare an **unqualified** "constitutional right to an abortion...."'" *Id.* at 874 (emphasis added). Thus, the Casey plurality cautioned that "considerations of the **nature** of the abortion right illustrate that it is an **overstatement** to describe it as a right to decide whether to have an abortion 'without interference from the State.'" *Id.* at 875 (emphasis added).

In brief, the pregnant woman's privacy is not a "right to be insulated from all others...." *Id.* at 877. And, as noted above, the Casey plurality reaffirmed that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." Casey at 885. This then forms the constitutional predicate of the right of

privacy against which the Texas laws at issue in this case must be measured.

B. The Admitting Privileges Requirement Is Subsumed in the Pregnant Woman's Privacy Right and, Therefore, Does Not Unconstitutionally Burden that Right.

Five years after Casey, in a *per curiam* decision — agreed to by two of the three justices composing the Casey plurality — the Court upheld a Montana statute restricting the performance of abortions to licensed physicians. Mazurek v. Armstrong, 520 U.S. 968 (1997). Quoting from Roe v. Wade, the Court reiterated "that 'the State may define the term "physician," ... to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.'" Mazurek at 974. Continuing on, the Mazurek Court "reiterated this view in *Connecticut* v. *Menillo,* 423 U.S. 9, 11 (1975) ... [that] prosecutions for abortions conducted by nonphysicians infringe upon **no realm of personal privacy** secured by the Constitution against state interference." Mazurek at 974 (emphasis added). Thus, the Court restated Roe v. Wade as having established "a woman's right to a clinical abortion by medically competent personnel." Connecticut v. Menillo, 423 U.S. 9, 10 (1975). And from that point, Mazurek concluded that Montana "may mandate that only physicians perform abortions." Mazurek at 975.

In so ruling, the Mazurek Court rejected the claim "that the Montana law must have had an invalid

purpose because 'all health evidence contradicts the claim that there is any health basis' for the [physicians only] law." *Id.* at 973. In fact, the Mazurek Court rejected outright the argument that studies showed "no significant difference" between the "complication rates" for first-trimester abortions performed by physicians and physician assistants. *Id.* In support, Mazurek turned to Casey, stating that "this line of argument is squarely foreclosed [because] 'the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*'" Mazurek at 973 (italics original).

What Mazurek and Casey "foreclosed," plaintiffs are attempting to force open. By enacting the admission privileges requirement — requiring any physician who performs an abortion to have admitting privileges at a local hospital — the Texas legislature had before it ample evidence to support its claim that the new requirement would give added health protection to the pregnant woman. *See* Brief for Respondents ("Resp. Br.") at 33-34. Especially poignant is the Texas Respondent's account that the admitting privileges requirement would be useful "in terms of getting records":

> In my experience a lot of these young girls, they're scared. They come away from the abortion. They ... don't know who the doctor was. And so it's very, very difficult to get a good history out of them. [*Id.* at 34.]

The right of privacy established in Roe v. Wade, as reaffirmed in Casey, was based upon an entirely different picture of the relationship between physician and patient. While the licensing requirement may have been sufficient to protect the pregnant woman's health interests in the antiseptic world of abortion promised by the Court in Roe v. Wade (*id.* at 153), the Texas legislature would have ample authority to revisit the issue of the qualifications of its licensed physicians. After all, as this Court observed in Menillo, the woman's right of privacy is:

> predicated upon the first trimester abortion's being as safe for the woman as normal childbirth at term, and that predicate holds true only if the abortion is performed by **medically competent personnel** under conditions insuring **maximum safety** for the woman. [Menillo at 11 (emphasis added).]

Finally, as the Texas Respondent has amply demonstrated, striking down the requirement that Texas physicians licensed to perform abortions have local hospital admittance privileges would surely overrule Mazurek. *See* Resp. Br. at 15.

C. The Ambulatory Surgical Center Requirement Is Subsumed in the Pregnant Woman's Privacy Right and, therefore, Does Not Unconstitutionally Burden that Right.

As the Texas Respondent's Brief attests, the Texas legislature was prompted by "the Kermit Gosnell

scandal ... to improve the standard of care for abortion patients." Resp. Br. at 1. What America learned from that scandal was that "legalizing abortion" would not automatically rid the nation of "back alley abortions," but rather would move them out of the alleys and on to Main Street. As the Texas brief points out, it would have been irresponsible for the State legislature not to have enacted H.B. 2 into law, especially with respect to the standards to be applied and enforced to elevate the state's abortion facilities at least to the minimum standards governing ambulatory surgical centers. *Id.*

How else would the Petitioners and their *amici* — including the United States government — have the State of Texas respond? According to the United States, the most important component of the woman's right to privacy is the facilitation of abortion. *See* Brief for the United States as Amicus Curiae Supporting Reversal ("U.S. Br.") at 26-33. Roe v. Wade, however, contemplated a regime in which abortions would be "safe, legal and rare." Throughout its opinion, the Roe v. Wade Court expressed its concern for the health of the pregnant woman seeking an abortion, presuming that her health concerns would be met at the same level of treatment as would a pregnant woman seeking a live birth. *See* Menillo at 11. To that end, the Roe v. Wade Court acknowledged that the woman's right to terminate her pregnancy would be realized only if "like any other medical procedure, [it] is performed under circumstances that insure **maximum safety** for the patient." *Id.* at 150 (emphasis added). "This interest," the Court continued, "**obviously** extends at least ... to the **facilities** involved ...." *Id.* (emphasis added). If the

facility were not safe, then it would not be legal. Thus, the Roe v. Wade Court concluded that the right of privacy to terminate one's pregnancy was conditioned upon it being performed in a "licensed facility," according to standards established by the State — not wherever selected by the pregnant woman. *See id.* at 163. And certainly not as determined by the abortion providers themselves.

Petitioners argue that it is for the courts, not the state legislatures, to balance the interests of the pregnant woman's health with the degree of access that she has to obtain an abortion. *See, e.g.*, Pet. Br. at 39-40. That is not the law, even under Casey. *See* Resp. Br. at 27-28, 32-35. Rather, as both the Casey plurality and the Mazurek Court ruled, the state's "latitude" in protecting the health of the pregnant woman need only meet the "rational basis" test in Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). *See* Casey at 884; Mazurek at 973. According to Lee Optical, it is enough that a state regulation of the public health and welfare be rationally related to the object of that legislation. *Id.*, 348 U.S. at 489. As the Texas Respondent has noted, the district court below found a "rational basis" for both H.B. 2 requirements. Resp. Br. at 29. That should be the end of the matter. According to Casey, that is as far as the courts may go without intruding upon the "broad latitude"of the State contemplated by the Roe v. Wade definition of the woman's right. *See* Casey at 885.

II. ROE V WADE REPRESENTED A RADICAL BREAK WITH AMERICA'S CONSTITUTIONAL TRADITION.

A. Texas Ably Defends the Texas Statutes Based on this Court's Abortion Jurisprudence.

Respondent Texas has done a masterful job of arguing this case in accordance with this Court's abortion jurisprudence, explaining why the State law concerning ambulatory surgery centers and the State law concerning hospital admitting privileges are fully consistent with Casey, and succeeding cases. Texas has demonstrated, *inter alia*, that neither state law imposes an "undue burden" on a woman's access to abortion. *See* Resp. Br., Section III. However, the two state statutes in question could be upheld on an additional ground — because Roe v. Wade and its progeny were wrongly decided.

B. The Texas Statutes Were a Response to the Murders Perpetrated by Abortionist Dr. Kermit Gosnell.

The Texas brief demonstrated that its State legislature was prompted by, and specifically responded to, the scandal involving the care rendered to women and babies by Dr. Kermit Gosnell in Pennsylvania. *Id.* at 1-2. As the Texas Brief mentioned, ancillary to its responsibility in returning numerous indictments, the Philadelphia Grand Jury was so horrified by the practices at Dr. Gosnell's abortion clinic that it issued a 247-page report

exposing its practices, as well as detailing the total failure of state health officials to respond to innumerable reports of illegal and dangerous behavior. Report of the Grand Jury, In Re County Investigating Grand Jury XXIII, No. 0009901-2008 (1st Judicial Dist. of Pa.; Jan. 14, 2011).[2] That Grand Jury report begins ominously:

> This case is about a doctor who killed babies and endangered women. What we mean is that he regularly and illegally delivered live, viable, babies ... and then murdered these newborns by severing their spinal cords with scissors. The medical practice by which he carried out this business was a filthy fraud in which he overdosed his patients with dangerous drugs, spread venereal disease among them with infected instruments, perforated their wombs and bowels – and, on at least two occasions, caused their deaths. Over the years, many people came to know that something was going on here. But no one put a stop to it. [*Id.* at 1.]

After years of inflicting unspeakable harm on the people of Philadelphia, Gosnell finally was convicted of first degree murder of three babies by severing their spinal cords with scissors after they were born alive during "failed" abortions. He also was convicted of involuntary manslaughter of one woman who came to him for an abortion. Gosnell is currently serving a life

---

[2] http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf.

sentence without the possibility of parole.[3] While the Court in Roe did not anticipate that decision could have led to such atrocities, this case could present the opportunity to revisit the analysis of the Roe decision, which has led not just to the Dr. Gosnells of the country, but to the death of as many as 54 million babies since 1974.[4]

C. This Court's Abortion Jurisprudence Is Predicated on a Rejection of the Foundations of Our Republic.

The Roe v. Wade decision can only be understood as being grounded jointly on (i) the atextual notion of "privacy" (Roe at 152) and (ii) the judicially invented doctrine of substantive due process. *See* Roe at 167-68 (Stewart, J. concurring). Both constitutional doctrines have been employed by federal judges to reach decisions that otherwise would be impossible under the classic method of constitutional interpretation described by Thomas Cooley in his Treatise on the Constitutional Limitations (Little Brown: 1883): "The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." *Id.* at *55.

---

[3] R. Goldman, "Kermit Gosnell Avoids Death Row, Agrees to Life in Prison," ABC News (May 14, 2013), http://goo.gl/qglrhM.

[4] Even PolitiFact could not seriously challenge this 54 million estimate. http://www.politifact.com/new-jersey/statements/2012/mar/18/chris-smith/chris-smith-says-more-54-million-abortions-have-be/.

Having abandoned the historic understanding that the meaning of a Constitution was found in a search of the text for the "authorial intent"[5] of those who fashioned it, the Court has unmoored its decisions from the constitutional text. In doing so, it has freed itself to re-interpret the Constitution afresh for each succeeding generation. The Court has appointed to itself the power to amend the Constitution without resort to the Article V amendment process. In doing so, it has moved the nation into a post-constitutional world. And, it has lost the confidence of the American people that the Court follows the "rule of law."[6] Even before its highly controversial same-sex marriage decision, when asked "do you think the current U.S. Supreme Court justices decide their cases based on legal analysis without regard to their own personal or political views, or do you think they sometimes let their own personal or political views influence their decisions," 75 percent responded "Personal, political views," while only 16 percent responded "Just legal analysis."[7]

---

[5] *See, e.g.*, E.D. Hirsch, Validity in Interpretation (Yale: 1967) at viii, 1, 5, 212-23.

[6] According to a recent Gallup Poll, only 32 percent of Americans have confidence in the U.S. Supreme Court. J. McCarthy, "Confidence in U.S. Branches of Government Remains Low," Gallup.com (June 15, 2015). http://www.gallup.com/poll/183605/confidence-branches-government-remains-low.aspx

[7] CBS News/New York Times Poll, June 10-14, 2015 http://www.pollingreport.com/court.htm.

Illustrative of how the Court rationalizes its decisions under a "living"[8] and "evolving" Constitution is a recent oral argument with Justice Antonin Scalia's pointed questions and former Solicitor General Ted Olson's responses during U.S. Supreme Court Oral Argument in Hollingsworth v. Perry, 579 U.S. ___, 133 S.Ct. 2652 (2013):

> Justice Scalia: "When did it become unconstitutional to prohibit gays from marrying?... Was it always unconstitutional?"
> Ted Olson: "It was [un]constitutional when we — as a culture determined that sexual orientation is a characteristic of individuals that they cannot control..."
> Justice Scalia: "I see. When did that happen?..."
> Ted Olson: "There's no specific date in time. This is an evolutionary cycle." [*Id.*, Oral Argument (Mar. 26, 2013) at 39-40.[9]]

For most of this nation's history, there was a uniform national consensus based on the Biblical truth that man is created in the image and likeness of God

---

[8] Justice Scalia's treatise on Interpretations identifies and rebuts "The false notion that the Living Constitution is an exception to the rule that legal texts must be given the meaning they bore when adopted." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (West: 2012) 403-410. *See also* W. H. Rehnquist, "The Notion of a Living Constitution," 29 HARV. J. OF LAW & PUB. POLICY 401 (Spring 2006).

[9] http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5if6.pdf.

(Genesis 1:27), and that abortion was the unjustified taking of human life. *See* Roe v. Wade at 174-76 (listing 36 state or territorial laws limiting abortion when the Fourteenth Amendment was ratified, 21 of which were still in effect in 1973) (Rehnquist, J. dissenting). Indeed, the Fourteenth Amendment expressly protected life as the first and highest value: "No state shall ... deprive any person of life, liberty, or property, without due process of law...." That tradition ended abruptly in 1973, when this Court found that "due process" — a common law term that once was understood to mean that governments must employ fair procedural protections prior to violating a citizen's liberty[10] — actually encompassed a new, substantive right, never anticipated by the Framers of the Fourteenth Amendment: to protect the killing of a child in the womb of his mother.

The contrast of Roe to the foundational pillars of our nation could not be more stark. Upon his appointment as Dane Professor of Law at Harvard in 1829, Justice Joseph Story summarized the source of American law:

> One of the beautiful boasts of our ... jurisprudence is that **Christianity is part of the Common Law**, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines.... There never has been a period in which the Common Law did not recognize **Christianity as lying**

---

[10] *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276-77 (1856).

> **at its foundations.** [P Miller, The Legal Mind in America, 178 (Cornell: 1962).]

Ignoring the Christian undergirding of English and American law, Justice Blackmun began his analysis in Roe with a discussion of a very different tradition — which he termed "Ancient attitudes." Conceding that "[t]hese are not capable of precise determination," Justice Blackmun nevertheless observed that:

> abortion was practiced in Greek times as well as in the Roman Era, and that "it was resorted to without scruple".... Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion. [Roe at 130 (footnotes omitted).]

Indeed, Justice Blackmun accurately reported how the Greeks and Romans sanctioned abortion, but did not tell the whole story — for these pagan societies also sanctioned infanticide. M.S. Evans, The Theme is Freedom at 138 (Regnery: 1994) ("the ancient Greeks and Romans also believed in outright infanticide and the wholesale 'exposure' (abandonment) of children.") As Will Durant recounted, infanticide was so common in ancient Rome that "[b]irth itself was an

adventure...." W Durant, Story of Civilization III: Caesar and Christ (Simon & Schuster: 1944) at 56.[11]

D. When Life Begins Is a Quintessential Religious Issue.

By contrast, the Christian underpinnings of American law permit neither abortion nor infanticide. Quite unlike his focus on the practices of pagan societies, Justice Blackmun made only passing references to Christianity, such as perhaps his characterization of anti-abortion laws as "the product of a Victorian social concern to discourage illicit sexual conduct." Roe at 148. Otherwise, he does not appear to entertain the notion that the Holy Scriptures may give guidance on the matter. Remarkably, Justice Blackmun did not once employ the word "God" or "Bible" in his decision, apparently denigrating any such considerations as mere "religious training ... likely to influence and to color one's thinking and conclusions about abortion." Roe at 116.

Yet the issue of when life begins is exactly the type of issue that is decided by religion.[12] There are

---

[11] Justice Blackmun also reviewed at length the modern laws of England and, at length, the position of the American Medical Association, the American Public Health Association, and the American Bar Association, but the answer to when life begins has not been entrusted to physicians, lawyers, and government agencies. Roe at 141, 144, 146.

[12] Since Roe was decided, science increasingly has come to recognize that life begins at conception, not at viability, or some other time. *See, e.g.*, R. Alcorn, "Scientists Attest to Life

innumerable Bible passages. Amos 1:13 refers to punishment of those tho "ripped open the women with child." Jeremiah 20:17 refers to a killing that could occur in the womb: "He didn't kill me in the womb, with my mother as my grave." In Jeremiah 7:6 we see the command "do not shed innocent blood." Deuteronomy 27:25 declares "Cursed is the man who accepts a bribe to kill an innocent person." Exodus 20:13 contains the commandment "You shall not murder." *See also* Genesis 1:27; Exodus 20:13, 21:22-23; Deuteronomy 30:19; Psalm 22:10, 127:3-5, 139:13-16; Job 10:8-12, 12:10, 31:15; Isaiah 49:15; Jeremiah 1:5, 7:6; Amos 1:13; Ezekiel 16:20-21; Galatians 1:15.

The Bible reveals God's special love for children, using them to illustrate the nature of His kingdom: "Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven." Matthew 19:14. Contrast that love of children with the slaughter of the innocents by Herod the Great in Matthew 2:13-23, recording that "Herod ... sent forth and put to death all the male children who were in Bethlehem and in all its districts, from two years old and under...."

Justice Blackmun simply assumed it unnecessary even to consider the Holy Writ, though the nation was founded by the Declaration of Independence, which repeatedly recognized our Creator:

Beginning at Conception," http://naapc.org/why-life-begins-at-conception/.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...

If Justice Blackmun found a "right to an abortion" in the Constitution, that right certainly was not envisioned by the Declaration's assertion of the "unalienable Right [to] Life" sourced in our Creator.

Self-evident truths precede the Constitution and are superior to it. The Holy Bible contains self-evident truths. The Declaration explains that our rights come not from government, but from our "Creator." The first of those rights is "Life." Rather than interpret the Constitution to find the authorial intent of the Framers, in the context of the Declaration of Independence and pre-existing self-evident truths, Justice Blackmun devised an opinion manufactured from whole cloth, not worthy to be considered an exercise of judicial judgment, but rather a transparent exercise of judicial will. *See* Federalist No. 78, G. Carey & J. McClellan, The Federalist (Kendall-Hunt:1990) at 402.

The Preamble to the U.S. Constitution promises to "secure the blessings of Liberty to ourselves and our posterity." Roe v. Wade betrays that promise, denying to millions of our posterity their right to life, liberty, and the pursuit of happiness.

CONCLUSION

The challenge to the laws of the state of Texas should be dismissed. However, if the position argued by Texas is not adopted by this Court, then rebriefing should be ordered on the issue of whether Roe v. Wade should be overruled.

Respectfully submitted,

MICHAEL CONNELLY
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

J. MARK BREWER
BREWER & PRITCHARD, P.C.
Three Riverway, 18th Floor
Houston, TX 77056
(713) 209-2950

WILLIAM J. OLSON*
HERBERT W TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*

Attorneys for Amici Curiae

February 3, 2016